

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1083

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To be argued by
MARK A. SPEISER

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-1083

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GAMBINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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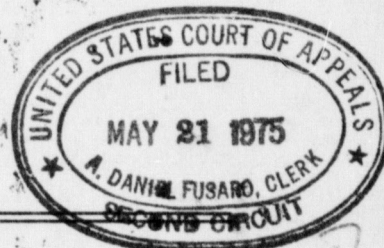


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—v.—

JOSEPH GAMBINO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Gambino appeals from an order of the United States District Court for the Southern District of New York, filed on January 30, 1975, by the Honorable Charles H. Tenney, United States District Judge, denying Gambino's motion under Title 28, United States Code, Section 2255, for an order vacating his conviction.

Indictment 72 Cr. 648, filed June 1, 1972, charged Gambino in one count with falsely representing that he was a citizen of the United States. Trial commenced before Judge Tenney and a jury on January 30, 1973, and on February 2, 1973, Gambino was found guilty. On April 17, 1973, Judge Tenney sentenced Gambino to imprisonment of one year with execution suspended, probation for one year and a fine of \$750.

Gambino appealed his conviction to this Court, which affirmed without opinion on September 26, 1973 (Moore, Mansfield and Oakes, *C.J.J.*). 483 F.2d 1399. The Supreme Court subsequently denied *certiorari*, 416 U.S. 982 (1974).

On October 24, 1974, Gambino filed a motion under 28 U.S.C. § 2255 to vacate his conviction. The motion was denied by Judge Tenney by order filed January 30, 1975.

Statement of Facts

I. The Trial

The Government charged and proved at trial that at an interview by Special Agent Edwin Taylor of the Federal Bureau of Investigation on June 7, 1967, Gambino had falsely stated to Taylor, among other things, that he had become a United States citizen in 1960.* It was conceded that Gambino was not and never had been a citizen. His defense at trial was that Special Agent Taylor had never asked about his citizenship and that, in any event, any false statement about his citizenship resulted from Gambino's unfamiliarity with the English language. Both of these contentions were overwhelmingly rebutted by the evidence and were rejected both at trial** and by this Court on direct appeal.

II. The Motion Under Section 2255

Gambino's motion to vacate his sentence was predicated on an opinion by the Honorable Gerhard A. Gesell, United States District Judge for the District of Columbia, holding 18 U.S.C. § 1001 inapplicable to false statements made

* Some of the other false statements Gambino made to Taylor at this interview are summarized at pages 4 and 5 of his brief on this appeal.

** A more complete statement of the proof at trial may be found at pages 2 through 8 of the Government's brief on Gambino's direct appeal, Dkt. No. 73-1916.

to F.B.I. agents. *United States v. Ehrlichman*, 379 F. Supp. 291 (D.D.C. 1974). From that opinion Gambino argued that Section 911 of Title 18 should not apply to his false statement to Special Agent Taylor. Judge Tenney rejected the argument and denied the motion (13a).

ARGUMENT

The District Court properly denied Gambino's motion to vacate his conviction.

On appeal, Gambino renews his contention below, based on Judge Gesell's opinion in *United States v. Ehrlichman*, *supra*, that Section 911 of Title 18, United States Code, should not have been applied to his false statement about his United States citizenship to Special Agent Taylor. The argument is without merit.*

* While proceeding to the merits of this appeal, we believe it appropriate to note that there is grave doubt that this Court has jurisdiction of Gambino's appeal or that the District Court had jurisdiction of Gambino's application to vacate his conviction.

Gambino's motion (6a) was purportedly made under 28 U.S.C. § 2255, which authorizes relief to "[a] prisoner in custody" under circumstances set forth in the cited Section. However, at the time this motion was made, Gambino was neither in custody nor on probation, having completed service of the sentence imposed in 1973 by Judge Tenney; accordingly, quite apart from the merits of his motion, Gambino was entitled to no relief under Section 2255. Moreover, Gambino's motion was entirely defective, for it was made in the criminal action in which Gambino had been convicted, rather than, as settled practice requires, by the initiation of a separate civil proceeding attacking his conviction collaterally. *United States v. Hayem*, 342 U.S. 205, 222 (1952); *D'Allesandro v. United States*, Dkt. No. 74-2682 (2d Cir., May 1, 1975); *Brown v. United States*, 480 F.2d 1036, 1039 (5th Cir. 1973); *Jenkins v. United States*, 325 F.2d 942 (3d Cir. 1963). See also *Andrews v. United States*, 373 U.S. 334, 338 (1963).

In addition, since Gambino elected to seek his relief within the framework of the criminal case and commenced no separate

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What Gambino has entirely overlooked in his reliance on Judge Gesell's opinion that Section 1001 of Title 18 does not apply to false statements at interviews with F.B.I. agents is that the law is settled to the contrary in this Circuit. *United States v. Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1003 (1967). Moreover, as Judge Tenney properly noted in his endorsement below, Gambino was not convicted under Section 1001 of Title 18 but rather under Section 911 of that Title. Whatever might be the proper limitations on prosecutions under Section 1001 for false statements made to F.B.I. agents, it has been the law in this Circuit for decades that Section 911 applies to oral statements falsely claiming United States citizenship made not merely to *any* government official but indeed to *any person*, whether a government official or a private individual, who has an adequate reason to inquire. *United States v. Achtner*, 144 F.2d 49 (2d Cir. 1944). *United States v. Romberg*, 150 F.2d 116 (2d Cir. 1945).^{*} See also *Rodriguez v. United States*, 433 F.2d

civil proceeding under Section 2255, his appeal should be controlled by the appellate rules governing appeals in criminal cases, specifically Rule 4(b) of the Federal Rules of Appellate Procedure. See *D'Allesandro v. United States*, *supra*, slip op. at 3400-3401. Under that rule, Gambino was required to file his notice of appeal within ten days of Judge Tenney's order, which was filed on January 30, 1975. Instead, Gambino's notice of appeal was filed on February 27, 1975, some seventeen days too late under F.R.A.P. 4(b) in the absence of an extension of time by the District Court, which Gambino did not seek.

^{*} The holdings in *Achtner* and *Romberg* go far in establishing the inappositeness of Judge Gesell's views in *Ehrlichman* to prosecutions under Section 911. Moreover, quite apart from the substantial authority in this Circuit taking a different view of the question under both Section 1001 and Section 911, the primary justification articulated in Judge Gesell's opinion for his conclusion—"In short, the F.B.I. interview may occur—as it did here—under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction . . ."—seems peculiarly insubstantial. We respectfully submit that interviews by F.B.I. agents are

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964 (9th Cir. 1970); *United States v. Franklin*, 188 F.2d 182, 187 (7th Cir. 1951); *United States v. Tandaric*, 152 F.2d 3 (7th Cir. 1945), *cert. denied*, 327 U.S. 786 (1946).

Finally, Gambino concedes that he did not raise his present contention either at trial or on direct appeal. Consequently, he is foreclosed from raising it on collateral attack. *Kaufman v. United States*, 394 U.S. 217, 227 n. 8 (1969); *Henry v. Mississippi*, 379 U.S. 443, 451-452 (1965); *Johnson v. United States*, 318 U.S. 189, 200-201 (1943); *United States v. West*, 494 F.2d 1314 (2d Cir. 1974), *cert. denied*, 419 U.S. 899 (1974); *Williams v. United States*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972). Indeed, even if this Court were at some time to reject the statutory construction announced in *Achtner* and in *Adler*, Gambino, having failed to raise the claim except on his present collateral attack, would be foreclosed from obtaining relief. *United States v. Travers*, Dkt. No. 74-1737 (2d Cir., December 16, 1974). See also *Williams v. United States*, *supra*.

matters to which an ordinary citizen would attach great weight and that a normal person would realize that it is *malum in se* to lie to the F.B.I. Such a view seems particularly applicable to a person of the sort involved in the case before Judge Gesell.

Secondly, the relative simplicity of the issue whether an individual has stated that he is a United States citizen or not also renders inapposite to Section 911 Judge Gesell's observations about the dangers of a prosecution founded on an oral statement not contemporaneously recorded.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York)

MARK SPEISER

deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 21st day of May
he served a copy of the within Brief for the United States
by placing the same in a properly postpaid franked
enveloped addressed: Roy M. Cohen, Esquire
Saxe, Bacon, Bolan & Manley, P.C.
39 East 68th Street
New York, New York 10021

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Mark Speiser
MARK SPEISER

Sworn to before me this

21st day of May, 1975
William J. Kronwall

WILLIAM J. ARONY
Notary Public, State of New York
No. 4505839
Qualified in Rockland County
Commission Expires March 30, 1977